NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-319

COMMONWEALTH

vs.

HECTOR CASTRO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from an order denying his motion to withdraw his guilty pleas and an order denying his motion for reconsideration. He argues that, for various reasons, his pleas were not knowing, intelligent, or voluntary. We affirm the orders and remand the matter for resentencing.

Background. In September 2014 a grand jury returned indictments against the defendant for possession of a firearm without a license (indictment 1), possession of ammunition without a firearm identification card (indictment 2), possession of a loaded firearm without a license (indictment 3), assault by means of a dangerous weapon (indictment 4), and two charges pursuant to the Armed Career Criminal Act, G. L. c. 269, § 10G (ACCA), of committing a firearm violation after three prior convictions of a violent crime or serious drug offense

(indictments 5 and 6). In May 2015 the defendant pleaded guilty to indictments 1 through 4 as charged. On each of indictments 5 and 6, he pleaded guilty to committing a firearm violation with one prior conviction of a violent crime or serious drug offense.

The plea judge originally sentenced the defendant as follows: four to five years in State prison on indictment 1; one year in the house of correction on indictment 2; four years' probation on indictment 3; and six to seven years in State prison on indictments 4, 5, and 6. All terms of incarceration were to be served concurrently, with the probationary term to be served from and after. In August 2015 the plea judge resentenced the defendant to four to five years in State prison on indictment 4 to conform to the maximum sentence for the offense of assault by means of a dangerous weapon. See G. L. c. 265, § 15B (b).

In May 2017 the defendant moved to withdraw his guilty pleas, arguing among other things that his conviction of possession of ammunition (indictment 2) had to be vacated because it was duplicative of his conviction of possession of a loaded firearm (indictment 3); that one of his convictions on indictments 5 or 6 also had to be vacated because it was merely an enhancement of indictment 2; and that his plea counsel was ineffective. In a thoughtful memorandum of decision, the motion judge (who was not the plea judge) agreed with the defendant

that his convictions on indictments 2 and 6 had to be vacated as duplicative.[1] Furthermore, the judge determined that indictment 5 was a sentencing enhancement and not a stand-alone offense, thus requiring the judgment on indictment 5 to be vacated, indictment 5 to be merged with indictment 1, and the defendant resentenced on the merged indictment so that his sentence reflected the enhancement. With respect to the defendant's remaining claims, the judge concluded that they failed to raise a substantial issue warranting an evidentiary hearing. The defendant moved for reconsideration, which the judge denied.

In April 2018 the motion judge held a resentencing hearing, at which the Commonwealth asked that the defendant be resentenced in accordance with the judge's decision. At the defendant's request, however, the judge declined to take any action pending this appeal.

Discussion. A motion to withdraw a guilty plea, which is treated as a motion for a new trial, may be allowed if "it appears that justice may not have been done." Commonwealth v. Scott, 467 Mass. 336, 344 (2014). "A strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly." Commonwealth

[1] The motion judge proceeded based on his understanding that indictment 6 was tied to indictment 2, while indictment 5 was tied to indictment 1, but stated that any error in this regard could be corrected at resentencing.

v. Gordon, 82 Mass. App. Ct. 389, 394 (2012). We review a judge's decision "only to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

Here, the motion judge carefully considered each of the defendant's reasons for withdrawing his guilty pleas and concluded that, while there were errors in the indictments and sentences that required corrective action, the defendant failed to show that justice had not been done as a result of the pleas. The defendant challenges the judge's decision on several grounds, which we address in turn.

First, the defendant argues that the plea colloquy was defective because the plea judge did not conduct a separate colloquy for indictments 5 and 6. But where a defendant is pleading guilty to penalty enhancements, "[t]he preliminary questioning conducted at the outset of the plea hearing on the underlying offense need not be repeated, so long as the judge makes clear, and the defendant understands, that the preliminary questioning applies equally to the plea on the subsequent offense portion of the charge." Commonwealth v. Pelletier, 449 Mass. 392, 398 (2007). In this case the plea judge explained to the defendant that two of the indictments required proof beyond a reasonable doubt that the defendant had prior convictions, and that the defendant "ha[d] a right to a trial with all the

constitutional rights [the plea judge] told [him] about, where the government has to, again, meet that burden of proof . . . beyond a reasonable doubt, that [he has] those prior convictions." The plea judge then asked the defendant whether he understood, and the defendant replied in the affirmative. In light of this exchange, the motion judge did not abuse his discretion in concluding that the plea colloquy fully conformed to Mass. R. Crim. P. 12, as appearing in 470 Mass. 1501 (2015), and constitutional requirements.

Second, the defendant argues that there was an inadequate factual basis for his pleas to indictments 5 and 6 because the Commonwealth failed to establish that he was previously convicted of a violent crime or serious drug offense. But as the defendant acknowledges in his reply brief, one of his prior convictions, assault by means of a dangerous weapon, is categorically a violent crime. See G. L. c. 269, § 10G (e) (incorporating definition of "violent crime" from G. L. c. 140, § 121); G. L. c. 140, § 121 (defining "violent crime" to include "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another").[2] Thus, because the defendant pleaded

[2] Assault by means of a dangerous weapon is punishable by up to five years in State prison. See G. L. c. 265, § 15B (b).

guilty to having only one prior conviction under the ACCA, the prosecutor's statement at the plea hearing that the defendant was previously convicted of "assault dangerous weapon in the Marlborough District Court" established an adequate factual basis for the pleas.

Third, the defendant claims that he should be allowed to withdraw his pleas because of defects in indictments 5 and 6 and the grand jury presentment on those indictments. By pleading guilty, however, the defendant has waived these claims. See Commonwealth v. Zion, 359 Mass. 559, 563 (1971); Commonwealth v. Sylvia, 89 Mass. App. Ct. 279, 287 (2016).

Finally, the defendant argues that his pleas were not knowing, intelligent, and voluntary because his plea counsel was ineffective. Specifically, he claims that plea counsel made the following errors: she gave up a viable motion to dismiss the indictments under Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982), failed to move to dismiss indictments 5 and 6 on grounds that the defendant's prior convictions were not qualifying offenses under the ACCA, and failed to move to dismiss the duplicative indictments.

The defendant's first two claims of error do not show that plea counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Counsel's

failure to pursue a McCarthy motion does not establish that she was ineffective "in the absence of a showing that such a motion would have been successful." Commonwealth v. Iglesias, 426 Mass. 574, 579 (1998). The defendant made no such showing. In fact, the motion judge determined that the McCarthy motion would have been denied because "the grand jury heard sufficient evidence to satisfy a probable cause to arrest standard."[3] The defendant has failed to demonstrate that this was an abuse of discretion.

The defendant also failed to show that plea counsel was ineffective by not moving to dismiss indictments 5 and 6. In addition to the defendant's prior conviction of assault by means of a dangerous weapon, the grand jury heard that he was previously convicted of assault and battery on a police officer and possession of a class B substance with intent to distribute. Regarding the assault and battery conviction, the Commonwealth concedes that, under Commonwealth v. Mora, 477 Mass. 399, 408 (2017), the certified record of conviction presented to the grand jury was insufficient to establish that the defendant committed a "violent crime." The Commonwealth further concedes that the defendant's drug conviction was not sequential as required by Commonwealth v. Resende, 474 Mass. 455, 462-470

[3] The motion judge noted that the defendant relied only on cases applying a reasonable doubt standard.

(2016). In determining whether counsel was ineffective, however, we must take into account that both Mora and Resende were decided after the defendant pleaded guilty. "To meet the constitutional requirements of effectiveness, an attorney need not be clairvoyant as to . . . future shifts in the legal landscape . . . ." Commonwealth v. Baran, 74 Mass. App. Ct. 256, 272 n.23 (2009). Here, the defendant does not explain how an ordinary fallible lawyer would have predicted the Supreme Judicial Court's future rulings when the defendant entered his pleas.

Moreover, the defendant failed to demonstrate that he was prejudiced by plea counsel's performance, see Saferian, 366 Mass. at 96, even assuming she was ineffective for failing to move to dismiss the duplicative indictments. As the motion judge found, the evidence against the defendant was "fairly overwhelming," and it was "all but assured" that he would be convicted on the firearms offenses.[4] As the judge further found, although assault and battery on a police officer is not categorically a violent crime, "at trial the Commonwealth would be free to offer evidence to show that" based on the circumstances surrounding the assault and battery, it was in

[4] The motion judge observed that "[t]he loaded firearm was taken by a police officer from [the defendant's] person incident to his arrest."

fact a violent crime.[5] The judge thus concluded that, even assuming retroactive application of Resende, the defendant had two prior qualifying offenses under the ACCA and was facing a ten-year mandatory minimum sentence if he went to trial. Instead, under the plea agreement, the defendant received a sentence of six to seven years, "three to four years less incarceration tha[n] his best possible result at trial."

In the affidavit he submitted with his motion, the defendant asserted that, had he known that some of the indictments were duplicative, he would not have accepted the plea agreement. The motion judge found that assertion not credible because "the duplicative [indictments] resulted in concurrent sentences, and did not change the length of the incarcerative portion of [the defendant's] sentence." The judge was entitled to so find. See Commonwealth v. Marrero, 459 Mass. 235, 241 (2011) (judge may summarily reject assertions contained in defendant's self-serving affidavit). In the end, given the favorable disposition the defendant received in the face of an overwhelming case for the Commonwealth, we discern no abuse of discretion in the judge's conclusion that the defendant was not

[5] According to the police report, which the Commonwealth submitted with its opposition to the defendant's motion, police responded to a domestic situation and saw the defendant fighting with another man. When officers tried to separate them, the defendant "became enraged," "began throwing punches," resisted arrest, and struck one of the officers in the leg.

prejudiced by his counsel's performance. See Commonwealth v. Pike, 53 Mass. App. Ct. 757, 763 (2002) (defendant failed to show prejudice from plea counsel's performance where he received more favorable disposition under plea agreement than he likely would have received after trial).

Conclusion. The order denying the defendant's motion to withdraw his guilty pleas and the order denying his motion for reconsideration are affirmed, and the case is remanded for resentencing.[6]

So ordered.

By the Court (Agnes, Shin & Wendlandt, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: July 29, 2019.

[6] To the extent we have not specifically discussed any of the defendant's arguments, we have considered them and found them to be without merit.

[7] The panelists are listed in order of seniority.